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Nos. 80-1538 and 80-1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER and STATE OF TEXAS, et al.,
Appellants,

v.

J. and R. DOE, as guardian ad litem for I. Doe, et al.,
Appellees.

IN RE: ALIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS EDUCATION AGENCY,
Appellants,

v.

UNITED STATES OF AMERICA,
Intervenor-Appellee,

and

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN,
Appellees.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

Amicus Brief of Edgewood Independent School District in Support of Appellees

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The Edgewood Independent School District by and through their Pro Bono counsel, the Mexican American Bar Association of San Antonio, Inc., moves the Court for leave to participate as Amicus curiae herein for the purpose of filing the attached brief.

Respectfully submitted,

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STATEMENT OF INTEREST

The Edgewood Independent School District is a political subdivision of the State of Texas located on the west side of San Antonio. Due to the poverty of the neighborhood it serves, the Edgewood ISD is among the poorest school districts in the state and nation.

The Edgewood ISD serves a fourteen (14) square mile area with approximately 80,000 residents. Property valuations average $6,400 and are among the lowest in the State.

The community served by the Edgewood ISD is made up almost entirely by Mexican Americans who, because of inadequate educational opportunities, have

achieved only minimal financial success.

For the 1981 school year, 15,827 students have been enrolled in 18 elementary schools, 6 middle schools, and 3 high schools. Coming generally from poor families headed by persons with only grade school educations, the children served by the Edgewood ISD generally have more extensive educational needs than children in other school districts. Despite these needs, low-wealth school districts, such as Edgewood, do not have access to local tax revenues that are proportional to the revenues generated by high-wealth school districts.

The Edgewood ISD employs 944 teachers most of whom are paid at or near the State's minimum salaries. Due to the low pay and lack of financial resources, the Edgewood ISD experiences some dif-

ficulty in recruiting and retaining teachers. Further, teachers, and students as well, must contend with inadequately heated and cooled buildings some of which date back to the 1930s since neither state nor federal funds may be used for capital improvements.

Given this extreme need for resources, a suit attacking the Texas system for financing public education was initiated by a group of Mexican American parents who resided in the district in 1968. In the landmark decision of San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), the Court denied the efforts by these parents to attain equal financial resources from the state for the education of their children.

In Rodriguez, the Court was pre-

sented with extensive information of the Edgewood ISD and the State funding plan, which, although almost ten years old, is fairly representative. The primary change in State funding since Rodriguez has been the adoption by the State of a school funding equalization program which has not really eliminated the financial gulf that separates the Edgewood ISD from wealthier districts.

Given this background, the decision of this court on the constitutionality of Section 21.031, which would have its greatest impact on poor, urban and predominantly Mexican American school districts, is of extreme significance. The Edgewood ISD opposes Section 21.031 which would, it believes, adversely impact the children Amicus serves.

QUESTIONS PRESENTED

1. Whether Section 21.031 of the Texas Education Code, which denies a free public education to undocumented alien children by withholding support from local school districts for their education while at the same time providing support for free public education to citizen and resident alien children, contains an invalid classification in violation of the Equal Protection Clause of the Fourteenth Amendment?

2. Whether the denial by the State of Texas of a free public education to all children except citizen and legal resident children is rationally related to a legitimate governmental objective?

SUMMARY OF ARGUMENT

The Equal Protection Clause provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV. It is undisputed by the State of Texas that legal resident aliens are entitled to the equal protection of the laws. It is also undisputed that the Due Process Clause extends to all aliens, even if they are undocumented. Shaughnessy v. United States, ex rel. Mezei, 345 U.S. 206 (1953). Therefore, the Court in this case need only address the issue of whether undocumented aliens are entitled

to equal protection of the laws.

The Supreme Court has already indicated that undocumented aliens are covered by the Equal Protection Clause. The Fifth Circuit in Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980) wrote:

> While the Supreme Court has never explicitly addressed whether the equal protection clause extends to illegal aliens, the Court in Wong Wing, supra, [163 U.S. 228(1896)] indicated that the Fourteenth Amendment does afford illegal aliens the equal protection of the laws. In Wong Wing the Court stated:
>
> > [In] the case of Yick Wo v. Hopkins, 118 U.S. 356, 369, it was said: "The Fourteenth Amendment is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' Those provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, ...

Id at 238, (emphasis added).

Doe at 455 (emphasis added by Fifth Circuit).

The above standard consists of a

very simple analysis under which entitlement to equal protection is determined by whether the person is within the territorial jurisdiction of the United States. The Fourteenth Amendment does not contain any modifier which requires legal presence in the United States; nor is there any case precedent for the proposition that undocumented aliens are not entitled to the equal protection of the law and may, therefore, be excluded from free public schools. Moreover, there is no legislative history which would indicate that entire groups of people, physically present within the United States, may constitutionally be denied the equal protection of the law. Based on the holding of Yick Wo and the absence of contrary authority, the fundamental

protections offered by the Equal Protection Clause must incompass undocumented alien children.

The Fourteenth Amendment is a pledge of conduct directed at all persons in the United States. It is not a contract, which undocumented alien children have failed to keep. It seems fair to say that if undocumented aliens are subject to the taxing power of the State, which they are, then they should not be denied the public education which is financed by those same taxes.

The only consistent solution to the problem created by the Section 21.031 is to apply the Equal Protection Clause to all persons physically present within the United States. The contention that people whose status within the United States is not documented are not "per-

sons" within the meaning of the Fourteenth Amendment invites some bizarre legal possibilities. For example, a state legislature might decide to base the range of penalties for various crimes on the documentary status of the victim. Upon a conviction, a felon might be sentenced up to 10 years if his victim were a citizen but only up to 6 months if his victim were an undocumented worker. This type of deprivation is the very kind which the Fourteenth Amendment was designed to protect against.

Finally, undocumented alien children must be afforded equal protection under the laws of the United States because they have no alternative sources of protection. These children are not sub-humans and will not disappear simply

because Section 21.031 refuses to acknowledge their needs and contributions. To deny that the children are within territorial jurisdiction of the United States places form over substance. Amicus can assure the Court that all of the 92 undocumented children in the Edgewood ISD are physically present and reside within the borders of the United States. Both the State of Texas and individual school districts must squarely face their obligation to provide an education for all children.

In sum, the Edgewood ISD has concluded that since the children of undocumented workers are persons within the jurisdiction of the United States, they must be afforded the fundamental protections of the Equal Protection Clause of the Fourteenth Amendment.

Therefore, their children cannot constitutionally be denied an education as Section 21.031 would provide.

I. THE DENIAL OF A FREE PUBLIC EDUCATION TO UNDOCUMENTED ALIEN CHILDREN ABRIDGES THE EQUAL PROTECTION OF THE LAW AND MUST BE STRICTLY SCRUTINIZED.

A. SECTION 21.031 OPERATES TO THE PECULIAR DISADVANTAGE OF A SUSPECT CLASS OF PERSONS.

The Constitutionality of the classifications used in Section 21.031 must be evaluated with the well-established two-tiered test. At the higher end of that scale, a state statute which creates a suspect classification or threatens a fundamental right must be strictly scrutinized. The contested

state statute may only be found constituional if it is found to be precisely tailored to further a compelling governmental interest. Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

In the instant case, Section 21.031 must be reviewed in accordance with the heightened, strict scrutiny standard because the statute singles out undocumented alien children for exclusion from free public education.

All the traditional indicia of suspectness are met in that:

> [The] class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973).

The facts in the instant case would seem to bear out that undocumented alien children have been relegated to such a position of political powerlessness as to command extraordinary protection (or at least ordinary protection) from the majoritarian political process. After all, the State has asserted that is has the political power to determine what rights, if any, undocumented alien children may have. Brief for the State of Texas at 17, 20, 31.

B. AS EDUCATION IS FUNDAMENTAL TO THE ENJOYMENT OF CONSTITUTIONAL RIGHTS, A LAW WHICH CAUSES CHILDREN TO BE TOTALLY DENIED A FREE PUBLIC EDUCATION MUST BE STRICTLY SCRUTINIZED.

The term education encompasses a variety of activities and events. In the home, it is a parent teaching a child love and respect, and the difference between right and wrong. In our public schools, education includes everything from teaching children reading, writing and arithmetic to instruction in the history of this nation and the protections granted to individuals by the Constitution.

These lessons in history and government are vital to the maintenance of this democracy. Our children learn that this nation is a government of laws, not men, and that the single most important document in this country is the Constitution. Children are taught that within our constitutional framework the law is not static but ever

changing. As an example of the Constitution's evolutionary process, students might learn that the right to vote, which was originally granted only to white male landowners, has gradually been extended to include nonlandowners, former slaves, women and 18 year olds. It is this type of instruction which Section 21.031 of the Texas Education Code would end.

Clearly, the State of Texas understands the significance of education in our democratic process as demonstrated by two provisions of the Texas Education Code. Section 21.032 of the Texas Education Code requires every child in the state between the ages of seven and seventeen years of age to attend public schools. Another provision requires all public free schools to offer instruction

in U. S. history and civil government. Tex. Educ. Code Ann. §21.101. The obvious intent of these laws was that all children be given the opportunity to learn their rights under the Constitution. Under the provisions of Section 21.031, though, this opportunity is denied to undocumented alien children.

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), Mexican American parents whose children attended school in Edgewood Independent School District challenged the constitutionality of a state school financing plan which was felt to discriminate against children who resided impoverished districts.

Although the instant case has many similarities to the Rodriguez case, there are some important differences.

Whereas Rodriguez centered on a school funding system which caused unequal education, the instant case deals with a state law which will cause a total denial of education. Justice Potter Stewart, who delivered the majority opinion in Rodriguez, wrote:

> "Whatever merit appelles' argument might have if a state's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for an interference with fundamental rights where only relative differences in spending levels are involved. . . ."

Rodriguez at 37.

Justice Stewart went on to write that because the procedure used by the State to fund public schools did not result in a total denial of education to poor children, a fundamental interest

was not involved. Rodriguez at 37. Thus, the Court's holding in Rodriguez was based on unequal education not total denial.

In the instant case, the Court must determine whether there is some quantum of education which is protected as fundamental. It cannot be disputed that these children will be denied an education by Section 21.031. The undocumented worker-parents of these children who reside in the Edgewood ISD are generally very poor. Few, if any, have any monetary savings to speak of. If the parents of these children were required to pay tuition, almost universally their children would be unable to attend school. This absence from school would not be the outcome preferred by the parents, rather, it would be an outcome

necessitated by economics. The law would force parents of undocumented alien children to choose between paying the rent and paying tuition. This is, in reality, no choice at all.

Amicus believes that this denial of education will have adverse, long term effects. The experience of the Edgewood ISD is that many of these undocumented alien children will eventually gain legal resident status. Assuming this trend were to continue, these educationally deprived children will grow into legal resident or citizen adults who will neither comprehend nor trust our system of government.

Undeniably, there is a minimum quantum of education that is fundamental to the enjoyment of constitutional protections.

The decision in the instant case will determine whether government can deny children the opportunity to learn the knowledge which is fundamental to understanding those rights we hold so essential.

Laws such as Section 21.031, which totally deny educational opportunity to a total class of children, must be strictly scrutinized and struck down unless the State can prove a compelling interest.

II. THE EXCLUSION OF UNDOCUMENTED ALIEN CHILDREN FROM A FREE PUBLIC EDUCATION BY THE ENACTMENT OF SECTION 21.031 IS NOT RATIONALLY RELATED TO THE FURTHERANCE OF ANY LEGITIMATE GOVERNMENTAL INTEREST.

Under the Equal Protection Clause, Section 21.031 must, at minimum, be

rationally related to the achievement of a legitimate state interest. Under this standard, the State of Texas, must articulate some justification for Section 21.031. The two primary justifications relied upon by the State, each of which will be addressed separately herein, are 1) that the State of Texas and school districts will be financially benefited by the exclusion of undocumented alien children; and 2) that the quality of education offered in Texas schools will be improved by the exclusion of undocumented alien children.

A. NEITHER THE STATE OF TEXAS NOR THE EDGEWOOD ISD WILL BE BENEFITED ECONOMICALLY OR FINANCIALLY BY THE EXCLUSION OF UNDOCUMENTED ALIEN CHILDREN.

A primary justification made by the State for Section 21.031 is that both the State and school districts will be economically benefited by the exclusion of undocumented alien children from school. Amicus respectfully submits that this would not be the case.

In truth, by withholding educational funds for undocumented alien children, the State embraces a "solution" which will cost much more than the total savings anticipated. There are a number of direct and indirect costs that will be attributed to the enactment of Section 21.031.

Section 21.031 will obviously have severe long term affects as undocumented workers and their children undergo a process of metamorphosis. If historical trends hold steady, a great many, if not

majority, of undocumented immigrants will eventually obtain legal resident or citizen status. If it is assumed that the State does not enact statutes denying educational opportunity to formerly undocumented alien children (a "grandfather" law), the naturalization process will force the schools of Texas to provide an education to those it previously ignored. If the State does not publicly choose to write these children off, public schools will be faced with higher educational costs as schools attempt to remedy past neglect with enriched and specialized educational programs. Alternatively, the State might determine to follow the low road and ignore the particular needs of the formerly undocumented alien children. The State might, of couse, try to justify

this course of action by rationalizing that somebody has to do the menial work in our society.

Uneducated because of their immigration status as children, these adults would enter an increasingly more technical job market without any skills. The lucky ones will be employed in non-skilled, manual labor jobs which pay low wages. Their tax contributions to the State will be low due to their diminished earnings capacity. The unlucky will become de facto wards of the State who will never be able to work due to the State's educational practices. These unskilled and illiterate persons will never be able to partake of the fruits of our society. They will be forever doomed to an existence on the fringe of our society.

The State also contends that the exclusion of undocumented alien children will most economically benefit poor, predominantly Mexican American school districts. In point of fact, the proposed exclusionary law will likely have the opposite effects.

State funding for local school districts is based, generally, on the number of students attending schools in the district and property valuations. As the number of students declines or the value of property decreases so does State support. Under Section 21.031, State support is withheld for each undocumented alien child located. As a result, school districts, including the Edgewood ISD, are forced into either educating these children without State support or excluding undocumented alien

children by charging them tuition.

In either event, the Edgewood ISD, because of its poverty and low property valuations, would suffer a greater economic injury than benefit from the operation of Section 21.031. Like other Texas school districts, the Edgewood ISD has three primary sources of income: state and federal support and local district property taxes. Due to its low property valuation, the Edgewood ISD in 1981 relied on local tax collection for only 7% of its support.

Local tax receipts were so low, in fact, that fixed costs, which currently account for 85% of expenditures, were not covered by the property tax levy and the Edgewood ISD was forced to rely on state and federal resources to meet these unavoidable costs.

This dependence is so high that, during 1980-81, the Edgewood ISD received approximately 72% of funding from state sources and 18% of its support from the federal government. Given the priorities of the current administration, Amicus believes that state funding will become even more vital to Edgewood ISD.

Under these circumstances it is readily apparent that the withdrawal of funds under Section 21.031 will adversely affect the economic position of the Edgewood ISD.

As undocumented alien children lose state support, they might be charged tuition which few, if any, could pay. Citizen and legal resident children who remain in school will suffer adversely as the district reduces variable costs to compensate for the lost state funding.

By withdrawing funds for the education of undocumented alien children, the State harms both the undocumented alien child and his impoverished classmate.

All of the above realities plainly speak against any economic benefit being realized by the exclusion of undocumented alien children from school. In all probability the withdrawal of educational funding for undocumented alien children will likely cost both the State and the school district more money than will be saved by Section 21.031.

B. THE ENACTMENT OF SECTION 21.031 WILL NOT IMPROVE THE QUALITY OF EDUCATION OFFERED TO LEGAL RESIDENT AND CITIZEN CHILDREN

The State of Texas alleges that the enactment of Section 21.031 will improve

the quality of education by excluding undocumented alien children from school. The State contends that the quality of education is low in high poverty school districts due to the attendance of undocumented alien children. In truth, the quality of education offered by impoverished school districts is not adversely affected by the attendance of undocumented alien children. The exclusion of undocumented alien children will not improve the quality of education for a number of reasons.

First, quality of education is closely interwined with educational funding. Funding decreases have a predictably adverse affect on quality of education.

A truly just system of education would probably provide the same level of support for children no matter where

they might live. The State of Texas, through its power to allow local school districts to generate their own taxes, does not provide the same amount of educational support for each child. In reality, the quality of education in poor school districts suffers, not because of the attendance of undocumented children, but due to the poor local tax base.

Secondly, undocumented alien children share so many characteristics with resident and citizen Mexican American children that their education would not cause special problems to school districts or adversely affect the quality of education. Historically, Mexican Americans have been discriminated against and denied equal opportunity such that only a few have been able to advance up the economic ladder. The housing that many Mexican Americans can afford is no

different from the housing of undocumented workers. As they live next door, the undocumented alien child and the Mexican American child socialize and play together. At school they will likely have the same learning needs. Any differences between these children will be caused more by their individual personalities than their birthplace. Thus, the education of undocumented alien children will not cause school districts to adopt exotic educational programs that they would not otherwise use.

Third, quality of education will not be adversely affected by the small numbers of undocumented alien children residing in the state. At trial, the State had predicted that there were upward of 100,000 undocumented alien chil-

dren. A 1981 study[1], based on data submitted by each school district to the State, found only 10,884 undocumented alien children attending schools in Texas. With approximately three million school age children in Texas, the number of undocumented alien children attending schools within the State is insignificant. Amicus does not believe that the admission of undocumented alien children will adversely affect the quality education it offers students.

CONCLUSION

Section 21.031 of the Texas Education must be held unconstitutional be-

[1]Cortez, Albert, "Distribution of Undocumented Children in Texas Schools: A First Look" (Intercultural Development Research Association: 1981).

cause it is violation of the Equal Protection Clause of the Fourteenth Amendment. As enacted, the harm which Section 21.031 will cause to all children, school districts and the State of Texas far outweigh any potential benefits. The decisions of the court below should therefore be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald J. Walheim, do hereby certify that true and correct copies of the foregoing Motion and Brief of Amicus Curiae, Edgewood ISD, have been served by placing same in the United States mail, addressed to: Mr. Richard Arnett, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711; Mr. Peter Roos, MALDEF, 28 Geary St., 6th Floor, San Francisco, California, 84108; Mr. James Turner, Civil Rights Division, Department of Justice, Washington, D.C. 20530; and Mr. John C. Hardy, 200 Peoples Bank Bldg. South, Tyler, Texas, 75702, on this 27th day of October, 1981.

_____

Donald J. Walheim